In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 214

HOME NEWS PUBLISHING COMPANY, INC., AND JAY MORTON, PETITIONERS

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is reported at 341 F.2d 20. No opinion was rendered by the district court. Its order dismissing the complaint (Pet. App. 8) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1965. A petition for rehearing was denied on March 5, 1965 (Pet. App. 9). The petition for a writ of certiorari was filed on June 4, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employee who testifies in a criminal proceeding charging violations of the Fair Labor Standards Act is entitled to the protection against discriminatory discharge afforded by Section 15(a)(3) of the Act.

STATUTE INVOLVED

Section 15(a)(3) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 1068, as amended, 29 U.S.C. 215(a)(3), provides:

> (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—
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> * * * *
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> (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;
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> * * * *

STATEMENT

The Secretary of Labor brought this action to enjoin petitioners from violating Section 15(a)(3) of the Fair Labor Standards Act and to require reimbursement of wages lost by an employee as a result of a discriminatory discharge. The complaint alleged

that one of petitioners' employees, Edward Morgan, in response to a subpoena, had testified as a witness on behalf of the United States in a prosecution charging petitioners with criminal violations of the Fair Labor Standards Act[1] and that, because of such testimony, the employee was discharged on the day following his appearance as a witness.

Petitioners moved to dismiss on the ground that the complaint failed to state a cause of action. They asserted that Section 15(a)(3) prohibits discriminatory conduct against an employee witness only when he has testified in a proceeding which *he* has instituted or caused to be instituted; accordingly, they argued, Section 15 (a)(3) would not apply in the present instance, since "[a]n employee cannot institute a criminal matter, nor can an employee cause the same to be instituted."

The district court dismissed the complaint on the ground urged by petitioners (Pet. App. 8). The court of appeals reversed, one judge dissenting. It held that the phrase "any such proceeding" in Section 15(a)(3) should be read as referring to "any proceeding under or related to [this Act]," rather than to "any proceeding" which an "employee has * * * instituted or caused to be instituted;" and concluded, accordingly, that the protection of Section 15(a)(3) runs to an employee who testifies in a criminal proceeding brought under the Act (Pet. App. 5-6).

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[1] The criminal prosecution resulted in a conviction which was affirmed by the Fifth Circuit prior to its consideration of the case at bar. *Home News Publishing Co., Inc.* v. *United States*, 329 F. 2d 191.

ARGUMENT

The court of appeals' construction of Section 15(a)(3) is clearly correct and its decision is not in conflict with any other decision. Further review is unnecessary.

1. Petitioners' argument that the phrase "any such proceeding" in Section 15(a)(3) refers only to proceedings which the employee has himself instituted or caused to be instituted is based upon a strained reading of plain and direct language. Section 15(a)(3) prohibits discrimination against any employee who has "instituted or caused to be instituted *any proceeding under or related to this Act.*" It then adds, without intervening language: "*or* has testified or is about to testify *in any such proceeding*" (emphasis added). In this context "such" clearly serves simply as a substitute for the longer phrase used to modify the same noun in the immediately preceding parallel reference; *i.e.*, "such" is used to avoid the repetition of "under or related to this Act" as the modifier of "proceeding." The implausibility of petitioners' attempt to have "such" absorb the content of the words "has instituted or caused to be instituted" becomes even more apparent when it is considered that the resulting construction would render a substantial portion of Section 15(a)(3) superfluous. The section, in terms, provides protection for an employee, who "has * * * instituted any proceeding under or related to this Act, *or* has testified * * * in any such proceeding." If the employees who testify must also have instituted the proceeding, then the specific reference to testifying would be wholly futile.

Even if the text of the statute were not so conclusive of the matter, the construction given it by the court of appeals is the only one consistent with the evident purpose of this provision. As this Court has pointed out, it was the objective of Section 15(a)(3), by prohibiting "economic retaliation," to encourage employees to assist in the enforcement of the Act by furnishing information concerning their employers' wage practices, and thereby "to foster a climate in which compliance with the substantive provisions of the Act would be enhanced." *Mitchell* v. *DeMario Jewelry, Inc.*, 361 U.S. 288, 292. Excluding from the statutory protection testimony given by an employee in proceedings under the Act which he did not himself institute or cause to be instituted plainly does not serve the Congressional purpose. Such an interpretation—which would be equally applicable to both civil and criminal actions—would render the Act's enforcement procedures largely ineffectual, for it would mean that in any back-wage or injunction proceeding the Secretary, as a practical matter, could feel free to call as a witness only that employee, if any, whose complaint had caused the proceeding to be brought. The court of appeals has correctly construed this provision "in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen." *Shapiro* v. *United States*, 335 U.S. 1, 31.

2. Petitioners' further argument, that a criminal prosecution arises under the Federal Criminal Code and cannot therefore be regarded as a "proceeding under or related to [the Fair Labor Standards] Act," is plainly untenable. Section 16(a) of the Act (29

U.S.C. 216(a)) expressly provides criminal penalties for violation of the Act's provisions; hence, any prosecution brought pursuant to the authority of that section—as was the prosecution in which Morgan testified—is clearly a proceeding "under or related to" the Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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